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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: METHYL TERTIARY BUTYL
4 ETHER ("MTBE") PRODUCTS
LIABILITY LITIGATION

MDL 1358
Master File C.A.
No. 1:00-1898(SAS)

5 -----x

6 May 1, 2007
12:15 p.m.

7
8 Before:

9 HON. SHIRA A. SCHEINDLIN,

District Judge

10 APPEARANCES (via telephone)

11 PETER HOFFMAN

12 Attorney for Basso Plaintiff Quatrochi

13 MILLER AXLINE & SAWYER

Attorneys for Basso and Tonneson Plaintiffs

14 BY: DUANE MILLER

TRACI O'REILLY

15 McDERMOTT, WILL & EMERY

16 Attorneys for Defendants Exxon Mobil Corp.
and defendants' liaison counsel

17 BY: STEVEN J. RICCARDULLI

JENNIFER KALNINS

18 BEVERIDGE & DIAMOND, P.C.

19 Attorneys for Defendant Sunoco, Inc. (R&M)

20 BY: DANIEL KRAININ

JOHN PAUL

21 MAURY HELLER

Attorney for Third-party Defendant Town of Highlands, NY

22 RAPPORT MEYERS WHITBECK SHAW & RODENHAUSEN, LLP

23 Attorneys for Third-party Defendant Favre Bros. Land, Inc.
24 and David and Leroy Favre
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(In chambers; attorneys on telephone)

THE COURT: Good afternoon. I have a court reporter here, so I am going to have to ask you to identifies yourselves one at a time for the record. Who is here for the plaintiffs?

MR. HOFFMAN: My name is Peter Hoffman. I am here on behalf of one of the Basso plaintiffs, Quatrochi.

THE COURT: We heard a little noise in the middle. We probably missed your full name. Wait a minute. Spell your last name.

MR. HOFFMAN: My name is Peter Hoffman, H-O-F-F-M-A-N, and I am the attorney for one of the Basso plaintiffs by the name of Quatrochi.

THE COURT: Any other plaintiff attorneys on the call?

MR. MILLER: Good afternoon, your Honor. This is Duane Miller with Traci O'Reilly on behalf of the Tonneson plaintiffs and some Basso plaintiffs.

THE COURT: Mr. Miller, what firm did you say you were with?

MR. MILLER: Miller Axline & Sawyer.

THE COURT: Oh, I guess you didn't say that. You said something about Tracy & Reilly or something?

MR. MILLER: Traci O'Reilly is with me.

THE COURT: Oh, that's what confused me. The usual firm Miller Axline.

Any other plaintiffs attorney? No.

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1 OK. Who is on the call for the defense?

2 MR. KRAININ: Your Honor, this is Dan Krainin,
3 K-R-A-I-N-I-N, of Beveridge & Diamond for Sunoco. And with me
4 in my office is my colleague John Paul.

5 THE COURT: OK. Is there anybody else on the call?

6 MR. HELLER: Yes, third-party defendants, your Honor.
7 This is Maury, M-A-U-R-Y, Heller, H-E-L-L-E-R, I'm for
8 third-party defendant Town of Highlands.

9 THE COURT: Third-party defendant Town of Highlands?

10 MR. HELLER: Yes, Highlands with an S.

11 THE COURT: Got it. Town of Highlands.

12 Anybody else on the call?

13 MS. ASNIS: Yes, your Honor. Shoshanah Asnis,
14 A-S-N-I-S, The law firm of Rapport Meyers for third-party
15 defendants Favre Bros. Land, Inc. and the individual Favres.

16 THE COURT: Savers? S-A-V-E-R-S?

17 MS. ASNIS: F, like Frank, A-V-R-E-S.

18 THE COURT: Favres. OK. Now, could you say your
19 name, firm name and client one more time now that we've sort of
20 got it?

21 MS. ASNIS: Sure. Shoshanah Asnis. The firm is
22 Rapport Meyers. Clients are third-party defendants Favre Bros.
23 Land, Inc. --

24 THE COURT: OK.

25 MS. ASNIS: -- and David and Leroy Favre.

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1 THE COURT: OK. That came across clearly this time.

2 Is there anybody else on this call?

3 MR. RICCARDULLI: Yes, your Honor. This is Stephen
4 Riccardulli from McDermott Will & Emery for Exxon Mobil
5 Corporation. And I have my colleague Jenn Kalnins,
6 K-A-L-N-I-N-S, with me as well.

7 THE COURT: OK. I'm hoping it's a no, but is there
8 anybody else on this call? Good.

9 All right. We have a very short agenda that I know
10 of. It's got two items and only two items. One is the Sunoco
11 defendants motion with respect to these mental examinations and
12 the potential adjustments to the CMO 23, which I had thought
13 were agreed upon but at the conference I heard they were not
14 agreed upon. So, could we start with the second one, the
15 potential adjustments to CMO 23.

16 MR. HOFFMAN: Your Honor, if I might. My name is
17 Peter Hoffman, and I represent the Quatrochis, one of the Basso
18 plaintiffs. Basically I had agreed to the time lines that were
19 in the original stipulation, and we had a problem getting our
20 appraiser onto the property consistently. We finally got a key
21 and he's been on the property. And we have discussed this
22 defense counsel and third-party defendant Town of Highlands
23 counsel, and we have all agreed to extend the time for the
24 report for the Quatrochis to be served on or before the 24th of
25 May.

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1 THE COURT: Excuse me. Hold on. I have in front of
2 me the proposed order. I could just mark it up to the new
3 agreement, if we could just follow that.

4 So, paragraph 1 in the proposed order that was
5 submitted to me said: 1. Expert discovery: Any outstanding
6 expert reports proffered by plaintiff shall be served on
7 defendants by.

8 And the date there was April 27.

9 Are you proposing a different date?

10 MR. HOFFMAN: Well, that would depend on my
11 adversaries, in the context of there were other things --

12 THE COURT: Well, April 27 is gone. Is that date
13 still the date for that first sentence?

14 MR. KRAININ: Your Honor, if I may clarify. This is
15 Dan Krainin for Sunoco. The Miller Axline firm represents the
16 Tonneson plaintiffs and several of the Basso plaintiffs, and
17 they served supplemental expert reports on April 27th and met
18 that deadline. So, at this point we are talking about just one
19 plaintiff's report for the Quatrochi family, which is
20 Mr. Hoffman's client.

21 THE COURT: And they want to get it in by when?

22 MR. HOFFMAN: We have agreed to the 24th.

23 THE COURT: The 24th of May?

24 MR. HOFFMAN: Yes, your Honor.

25 THE COURT: That will push everything off by a month.

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1 MR. KRAININ: Only with respect to the Quatrochi
2 reports.

3 THE COURT: Well, that's the case though. I mean the
4 case gets pushed off. OK. Before I fill in that date then,
5 May 24, let's see what it does to the rest of the schedule.

6 So, then the next sentence in the proposed order says,
7 "Any expert reports proffered by defendants shall be served on
8 plaintiffs by May 28." What would that change to?

9 MR. KRAININ: That would stay the same, with the
10 exception of a rebuttal report by defendants relating to the
11 Quatrochi report, which I agreed with Mr. Hoffman would be due
12 on June 22nd by defendant, again with respect to the Quatrochi
13 report.

14 THE COURT: I know, but it's one case. There goes a
15 month. OK, June 22. Then the next sentence says, "Any expert
16 reports proffered by third-party defendants shall be served by
17 June 29th." Can that stay the same?

18 MR. KRAININ: It's unclear whether the third-party
19 defendants will wish to respond to the separate Quatrochi
20 report. If they do, they would get 30 days or until July 20th
21 under this proposal.

22 THE COURT: Well, they're on the phone.

23 MR. HELLER: Your Honor, we do agree with that.

24 THE COURT: Wait, I'm sorry, I'm sorry. We couldn't
25 take that down at all because you didn't say your name firm.

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1 MR. HELLER: I'm sorry. This s Maury Heller for the
2 Town of Highlands.

3 THE COURT: All right. Then now say what you said
4 again, because we didn't hear you.

5 MR. HELLER: At this point we don't know whether that
6 time will be necessary, but in the event that it is, we need to
7 reserve that period in the event we have to reply to the
8 response to the Quatrochi report. That's the only reason why
9 that provision would be there.

10 THE COURT: Well, then the fourth sentence, it seems
11 to me the date could hold no matter what, and that says, "Any
12 expert deposition shall be completed by September 28th.

13 MR. KRAININ: We would agree on behalf of Sunoco, your
14 Honor.

15 THE COURT: I don't see any reason for that date to
16 change just because of the Quatrochi report and all the dates
17 that it's causing, trouble it's causing. It still shouldn't
18 change the end date for expert depositions, so I think the
19 September 28th can stand.

20 All right. The second paragraph in this proposed
21 order said, "Any party may file a motion for summary judgment
22 or other potentially dispositive motion on or before October
23 26th, '07.

24 That should stay the same, right?

25 MR. KRAININ: Yes, your Honor.

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1 THE COURT: And any opposition --

2 Who said that yes?

3 MR. KRAININ: Dan Krainin for Sunoco.

4 MS. O'REILLY: And Traci O'Reilly for the plaintiffs.

5 UNIDENTIFIED SPEAKER: Objection.

6 THE COURT: And any opposition papers should be filed
7 on or before December 14, and replies January 18. So, the
8 remainder stays the same, correct?

9 MR. KRAININ: Correct.

10 MS. O'REILLY: Yes, your Honor.

11 THE COURT: All right. So, we are done with that
12 agenda item.

13 MR. RICCARDULLI: Your Honor, this is Stephen
14 Riccardulli. I just want to raise one point for clarification.
15 Mr. Hoffman has indicated that he only represents the Quatrochi
16 plaintiffs in the Basso case at this point.

17 THE COURT: Right.

18 MR. RICCARDULLI: Mr. Hoffman filed that case on
19 behalf of all Basso plaintiffs, and we understand that
20 Mr. Miller is going to substitute in for all of the Basso
21 plaintiffs except for the Quatrochis.

22 THE COURT: OK.

23 MR. RICCARDULLI: But that has not been formally done
24 yet. I don't think there is any objection, but the
25 substitution of counsel has not been effected before the court

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1 at this point.

2 THE COURT: OK. So just take care of it, Mr. Miller.

3 MR. MILLER: We will, your Honor.

4 So, we are done with the proposed order. Does anybody
5 else want to add anything about the order to amend dates?

6 MR. KRAININ: No, your Honor.

7 THE COURT: Who is this?

8 MR. KRAININ: Two things.

9 THE COURT: Stop. Who is speaking?

10 MR. KRAININ: I apologize. Dan Krainin for Sunoco. I
11 simply wanted to note that we had contemplated -- or at least
12 Sunoco has -- that any Daubert motions would be filed
13 consistent with the schedule for dispositive motions.

14 THE COURT: Yes, I guess that's right, because the
15 depositions don't conclude until September 28, so I guess you
16 couldn't do the Dauberts until October 26.

17 But I will say -- I said it in the main conference,
18 and I don't know if you stayed -- don't use that reflexively.
19 Be pretty sure that you have a chance of winning a Daubert
20 motion; don't just make it for the sake of making motion
21 trouble. Also if you can make it earlier, do.

22 MR. KRAININ: Understood, your Honor.

23 THE COURT: There is no reason to wait until then.
24 So, please take both points to heart.

25 Now, with respect to the second item on this short

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1 agenda, I had read the letters in preparation for the big
2 conference, and then I guess one of the plaintiff's counsels
3 weren't there so I didn't proceed, and I thought the suggestion
4 that I don't even need to decide the examination issue until
5 after the question of whether the emotional damage claim is
6 going to be dismissed is decided. It seems to me it's a waste
7 to reach the issue. I forgot which side proposed that, but
8 whichever side said it, I agree with that. So, that's what we
9 are going to do.

10 Isn't it true that defense is moving to dismiss those
11 claims?

12 MR. KRAININ: Yes, your Honor. This is Dan Krainin on
13 behalf of Sunoco, and we had submitted that letter and made
14 that suggestion, and we would agree that --

15 THE COURT: I would like to hear why the plaintiffs
16 find that problematic. What's the difference? If the claim is
17 going to be gone, there clearly won't be any exams; and if the
18 claims stay, then I will decide. It's a pretty motion anyway,
19 but there is just no point in doing it until after we see if
20 the claims are going to stand.

21 MR. MILLER: Your Honor, this is Duane Miller. I have
22 no problem with that suggestion.

23 THE COURT: OK, good. So, when is that motion to
24 dismiss the emotional damage claim coming?

25 MR. KRAININ: Your Honor, that motion depends in part

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1 on the expert discovery that's ongoing. Plaintiffs rely in
2 part on the expert testimony of their toxicologist, Dr. Melman,
3 to support those claims, so we need rebuttal reports and his
4 deposition, but shortly thereafter we can bring on that motion.

5 THE COURT: So, you don't expect that motion until
6 next October?

7 MR. KRAININ: I believe we can file it before then,
8 but we haven't yet scheduled Dr. Melman's deposition or served
9 a rebuttal report, so there is still some work to be done in
10 the interim.

11 MR. MILLER: Your Honor, this is Duane Miller. I am
12 concerned about postponing mental exams to that late in the
13 schedule. It would extend the entire schedule.

14 THE COURT: Right. But I think -- first of all, from
15 what I read in the letters, I have to tell you my inclination
16 is there won't be any, but I don't want to be premature in that
17 ruling. But more importantly, I don't see why that motion
18 should drag around until October. Maybe we can tighten it up
19 and schedule it now. In other words, this Dr. Melman has a
20 report in already, right?

21 MR. KRAININ: That's correct.

22 THE COURT: And there is not going to be a separate
23 report from Mr. Hoffman on that issue, right?

24 MR. HOFFMAN: No.

25 THE COURT: No. So, you are essentially ready to go

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1 to take Melman's deposition. This is only May, so schedule it.

2 Can you take him in May?

3 MR. KRAININ: Your Honor ---

4 THE COURT: Who is this? We're not taking you down.
5 Whoever you are, we are not taking you down if you do not say
6 your name.

7 MR. KRAININ: I apologize. Dan Krainin for Sunoco.

8 THE COURT: Say it again.

9 MR. KRAININ: The rebuttal report to Dr. Melman's
10 expert report is due May 28.

11 THE COURT: Well, move that up. That's to me absurd.
12 When was the Melman report in?

13 MR. KRAININ: It was in about a month or so -- I don't
14 recall the date, your Honor. I would be happy to schedule a
15 deposition for beginning of June and file the motion by the end
16 of June if that's OK with the court.

17 THE COURT: Well, I think it's later than need be. I
18 think the rebuttal report could be in no later than May 21st,
19 and I think the deposition could be concluded of Melman by the
20 end of May. And we could have this motion made by June 15. So
21 why don't you try for my schedule, what I just said.

22 MR. KRAININ: OK, your Honor.

23 THE COURT: OK.

24 MR. MILLER: Your Honor, this is Duane Miller. I have
25 a recollection that Dr. Melman has a vacation outside the

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1 country. We may be able to accommodate the dates that you
2 suggested, but I'm just not sure.

3 THE COURT: Well, all right, a little flexibility. I
4 won't put it in the order, but that's the rough dates I would
5 like to see so we can get moving.

6 I think that's a limited motion compared to some of
7 the big things we have been dealing with lately. I would like
8 to get it, read it, decide it and move on, so you know whether
9 the claim is in or out; and if it's in, then I have to reach
10 the examination issue, which is only letter briefed. So, we
11 need to see.

12 In any event, that's the rough schedule. I think that
13 their rebuttal report could be in by May 21. You check
14 Melman's schedule. The earliest possible deposition
15 thereafter, and hopefully they will make the motion by June 15.

16 All right. I think that covers the limited agenda
17 that we had in this case. Is that right?

18 MR. MILLER: Yes, your Honor.

19 THE COURT: Did anybody else have any other item for
20 this conference? No? OK. Thank you.

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